COVERAGE OPINIONS
Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Effective Date:
January 16, 2013
Vol. 2, Iss. 2

The Cover-age Story

The Single Most Important Coverage Issue: Duty To Defend: "Four Corners" Or "Extrinsic Evidence"

The "Insurance Exception" To The "Four Corners" Rule

I've said this a gazillion times, so here goes a gazillion and one. There are a lot of issues in insurance coverage, but one stands far and away above them all in terms of importance: the standard for determining if an insurer has a duty to defend.

To be clear, I'm not referring to the duty to defend being broader than the duty to indemnify or the duty to defend being triggered if the complaint sets forth a single potentially covered claim. These are, generally speaking, non-controversial duty to defend truisms that apply in virtually every state and hardly need citation.

The duty to defend issue that really matters is whether it is determined by reference to solely the allegations in the complaint (the so-called "four corners" rule) or whether evidence outside the complaint may also be considered (the so-called "extrinsic evidence" rule).

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Declarations: The *Coverage Opinions* Interview With Robert Hartwig, Ph.D.

Coverage Opinions goes one on one with Bob Hartwig, President of the Insurance Information Institute and recently named "living legend" in insurance. When insurance is in the news, his is the voice that you can expect to hear – whether in the major print media or on broadcast or cable television – speaking for the insurance industry. Bob talks about the I.I.I. and the challenges of being a spokesperson for the insurance industry.

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Which rule applies ("extrinsic evidence" is the majority rule) can greatly affect which option an insurer will take in response to a complaint: write a disclaimer letter, undertake further investigation or pick up the phone and retain counsel.

In other words, which duty to defend rule applies can determine if an insurer has financial exposure for defense costs, which can then lead to the possibly of exposure for indemnity. Not to mention that, just the mere fact of having exposure for defense costs can lead to exposure for indemnity, as the insurer may now be inclined to settle the matter, if only to eliminate the defense exposure.

Of course, it may not seem like some grand revelation that the question of which duty to defend rule applies can affect if an insurer has financial exposure. After all, that can be said of the resolution of just about every coverage issue. Right -- but here's the difference. The duty to defend standard is relevant in just about every litigated claim, under every type of liability policy. Neither the facts of the claim, nor the type of liability policy matter, for the duty to defend to be a front and center issue.

On the other hand, just about all other coverage issues – no matter how important – are still only relevant in certain specific factual or policy scenarios. In other words, most coverage issues have narrow applicability. But the duty to defend is across the board a critical factor in determining an insurer's financial exposure. This is why it stands head and shoulders above all the rest.

As noted, more states consider extrinsic evidence for purposes of determining if an insurer has a duty to defend than those that limit review to solely the allegations within the four corners of the complaint. Sometimes people are surprised to hear that "four corners" is not the majority rule. But if you do the math the conclusion is clear. But not surprisingly, in the states that allow consideration of extrinsic evidence to determine an insurer's duty to defend, there are a host of follow-on issues, such as, what is the information that can be considered and the scope of investigation to find it. And while not true in every situation, extrinsic evidence is more likely to be permissible for use to establish an insurer's duty to defend than it is to eliminate a duty to defend that otherwise exists based on the four corners of the complaint.

In general, collateral issues are less likely to exist in "four corners" states. Here the duty to defend test is straightforward – based solely on the allegations contained in the complaint, does the potential for coverage, even for a single claim, exist. If the answer is yes, the insurer has a duty to defend. If the answer is no, the insurer does not. Easy.

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About The Editor

Randy Maniloff

Randy J. Maniloff is an attorney in the Philadelphia office of White and Williams, LLP. He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies. Randy is the co-author of "General Liability Insurance Coverage: Key Issues In Every State" (Oxford University Press, 2nd Edition, 2012). For the past twelve years Randy has published a year-end article that addresses the ten most significant insurance coverage decisions of the year completed. Randy has been quoted on insurance coverage topics by such media as The Wall Street Journal, The New York Times, USA Today, Dow Jones Newswires and Associated Press. For more biographical information visit www.whiteandwilliams.com. Contact Randy at Maniloff@coverageopinions.info or (215) 864-6311.

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But some "four corners" states – even those that describe their standard as being quite strict – make an exception, and are willing to look at information outside the complaint, to determine if an insurer has a duty to defend. Not to mention that they are willing to do so to allow an insurer to disclaim a defense. Some "four corners" states apply an exception, to their otherwise straight-jacketed complaint-only rule, "[w]hen the extrinsic facts relied on by the insurer are relevant to the issue of coverage, but do not affect the third party's right of recovery[.]" Pompa v. Am. Family Mut. Ins. Co., 520 F.3d 1139, 1147 (10th Cir. 2008) (applying Colorado law). In this situation, "courts occasionally have held that the insurer may refuse to defend third-party actions, even though the allega tions in the complaint suggest that coverage exists." Id.

My colleagues and I call this the red car – blue car situation. Take a policy that insurers a red car. There is an accident and the complaint does not state the color of the insured's car. Since the car in the accident could have been red, a "four corners" rule would suggest that a defense is owed. But reliable information, outside the complaint, makes clear that the insured's car in the accident was blue. Further, the insured's liability for the accident is not dependent upon the color of the car that he was driving. Since the car color is only relevant for purposes of coverage for the underlying action, and not liability issues, the "insurance exception" allows the insurer to use the extrinsic evidence, that the car at issue was blue, to disclaim a defense.

This issue was also before the Hawaii Supreme Court in Dairy Road Partners v. Island Ins. Co., Ltd., 992 P.2d 93, 117, n.14 (Hawaii 2000): "One example of an extrinsic fact upon which an insurer might rely pursuant to the new rule arises when an insurer argues that an occurrence was outside of the effective period of the policy. In such a case, the factual issue regarding the parameters of the effective period of the policy would not normally be subject to dispute in the underlying action."

And the question whether there exists an "insurance exception" to the "four corners" rule has been the subject of much debate in Texas. In GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, 197 S.W.3d 305 (Tex. 2005), the Supreme Court of Texas declined to adopt a narrow exception to its "four corners" rule (which it calls the "eight-corners" rule) that allows for the consideration of extrinsic evidence that "goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." Id. at 308–09. But one Texas appeals court still chose to adopt an "insurance exception," despite GuideOne.

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Inside The Insurance Mind Of Justice Sandra Day O'Connor

As discussed nearby, I've never considered the coverage issues associated with Chinese drywall to be significant in scope. But I took great interest in the Eleventh Circuit's recent decision in Granite State Insurance Company v. American Building Materials, holding that the pollution exclusion precluded coverage for damages associated with defective Chinese drywall. My interest in the case stemmed not from the coverage issues, but, instead, one of the three judges on the panel – retired United States Supreme Court Justice Sandra Day O'Connor sitting by designation. Justice O'Connor has not been unwilling to lend her services to Circuit Courts of Appeal since her retirement from the nation's top court. And she's even confronted some coverage issues in this designated hitter role.

But now here was Justice O'Connor, having at times been called one of the most powerful women in the world, and having provided crucial votes in cases addressing some of the most important issues of our time – campaign finance, abortion, school vouchers, Bush v. Gore, affirmative action, freedom of association, and on and

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See Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co., 343 S.W.3d 859, 865 (Tex. Ct. App. 2011) ("In light of the facts of this case, we are persuaded of the need for a very narrow exception to the eight-corners rule. The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts. Under this exception, the extrinsic evidence must go strictly to an issue of coverage without contradicting any allegation in the third-party claimant's pleadings material to the merits of that underlying claim.").

And quite recently an Oregon federal court was confronted with possibly applying an "insurance exception" to Oregon's "four corners" duty to defend rule. While the court in Clarendon America Ins. Co. v. State Farm Fire & Cas., No. 11-CV-1344 (D. Or. Jan. 3, 2013) concluded that it did not apply to the matter at hand, the court also seemed to leave little doubt that an "insurance exception," of some type, does exist in Oregon coverage law. The Clarendon America court quoted extensively from the 2010 Oregon Court of Appeals decision in Fred Shearer & Sons, Inc. v. Gemini Ins. Co.: "When the question is whether the insured is being held liable for conduct that falls within the scope of a policy, it makes sense to look exclusively to the underlying complaint. That complaint sets the boundaries of the insured's liability. . . . The same cannot be said with respect to whether a party seeking coverage is an 'insured.' The facts relevant to an insured's relationship with its insurer may or may not be relevant to the merits of the plaintiff's case in the underlying litigation. The plaintiff in the underlying case is required to plead facts that establish the defendant's liability; the plaintiff often is not required to establish the nature of the defendant's relationship to some other party or to an insurance company in order to prove a claim."

If more "four corners" states adopt an "insurance exception," the list of states that will truly be able to describe their duty to defend test as being limited to solely the allegations in the complaint will become shorter – even more than it already is.

Coverage Opinions

Contest: Insurance Coverage New Year's Resolutions

First, thank you to all who entered the Insurance Coverage Haiku contest. The response was phenomenal and now I have the task of going through the many entries to try to chose three that stand above the rest. This will not be easy as there were so many great entries. Results in the next issue.

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on and on, being called upon to address whether drywall that emits the smell of rotten eggs qualifies as a solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

What must she have been thinking? I can think of a few things. (1) Next time I'll read the fine print before agreeing to sit by designation on the Court of Appeals. (2) This is why we never let insurance coverage cases get to the Supreme Court. (3) Yes, the drywall smells, but that's not why I'm turning up my nose at this case. (4) Wait, I have an idea. I'll just declare Chinese drywall to be unconstitutional and go home. (5) There's an exclusion for pollution? How can that be? Doesn't that violate freedom of leach? (6) What's a pollutant? Didn't Justice Stewart know it when he saw it. (7) Hmm, I might have been wrong to blame Scalia for leaving an egg salad sandwich in the refrigerator for too long. Maybe the Supreme Court has Chinese drywall.

That's my time.

I'm Randy Spencer.

Contact Randy Spencer at
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Coverage Opinions Contest: - *Continued*

OK, new contest: Insurance Coverage New Year's Resolutions. It's that time of the year – for breaking your new year's resolution. I saw a statistic (and it must be true because it was on the internet) that 80% of new year's resolutions are down the tubes by January 20. Since there is a pretty good chance that your new year's resolution is already shot, you might as well start over and make a new one. And having already broken one resolution, you may be better off if your next one is in the make-believe category.

What do you resolve to do in 2013 concerning insurance coverage?

My entry: I resolve to shed some pounds – from my reservation of rights letters.

A copy of the 2nd edition of "General Liability Insurance Coverage: Key Issues In Every State" will be given to the three top entries.

Please send responses to Maniloff@coverageopinions.info. Responses due by January 29.

Employees of *Coverage Opinions* and their immediate families are not eligible. No purchase necessary. Void where prohibited. (I've always wanted to say that.)

Eleventh Circuit: Pollution Exclusion Precludes Coverage For Chinese Drywall

I've never considered the coverage issues associated with Chinese drywall, especially the pollution exclusion, to be significant in scope. Chinese drywall coverage is of interest to claims in only some states. And any state that has, as a general principle, that the absolute pollution exclusion is limited to traditional environmental pollution, is unlikely to view Chinese drywall as so qualifying. Also consider that Chinese drywall was not in use for a long time and builders presumably stopped using the trouble-ridden building material after they learned of its problems. To the extent that Chinese drywall involves latent damage, any latency period for damage is short. So, presumably, at some point, the litigation will stop. All of this is to say that Chinese drywall does not have the factors that have allowed some mass torts, such as asbestos, to drag on indefinitely.

Notwithstanding such views about Chinese drywall coverage, I would be remiss to not mention the Eleventh Circuit's early 2013 decision in Granite State Insurance Company v. American Building Materials, holding that the pollution exclusion (under both Massachusetts and Florida law) precluded coverage for damages associated with defective Chinese drywall. [The Circuit Court of Appeals took the efficient approach to choice of law analysis – avoiding it by simply concluding that both states would reach the same decision.]

Coverage Opinions is a bi-weekly (or more frequently) electronic newsletter reporting and providing commentary on just-issued decisions from courts nationally addressing insurance coverage disputes. Coverage Opinions focuses on decisions that concern numerous issues under commercial general liability and professional liability insurance policies. For more information visit www.coverageopinions.info.

The court held that, under Florida law, damages from Chinese drywall are precluded from coverage under the plain language of the pollution exclusion. And the court held that, under Massachusetts law, damages from Chinese drywall are precluded from coverage under the pollution exclusion because "defective drywall cannot be considered an everyday activity gone slightly, but not surprisingly, awry" and "the unexpected emission of sulfuric gas

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Eleventh Circuit:

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is the kind of release that a reasonable insured would understand as pollution."

That's pretty much the entire decision. It is not a significant decision for most people. But for those involved in Chinese drywall coverage, it is likely important, especially since the pollution exclusion is such a central issue when it comes to these claims.

Granite State Insurance Company v. American Building Materials, No. 12-10979 (11th Cir. Jan. 3, 2103) is available on the Eleventh Circuit website.

Insurer Must Fold Tense: Oregon Supreme Court: "Completed Operations Exclusion" Inapplicable Despite Complaint Pleading In Past Tense

Timing is everything, as the adage goes. And that is certainly so when it comes to insurance coverage, where such a pivotal requirement of the commercial general liability policy's insuring agreement is "bodily injury" or "property damage" during the policy period. This timing issue has been at the center of the decades-long trigger war in environmental coverage cases and is now being litigated in great numbers in construction defect coverage cases.

On the last day of 2012 (incidentally, 32 months after the case was argued – just one short of the time it takes to complete law school), the Supreme Court of Oregon issued its decision in Bresee Homes, Inc. v. Farmers Insurance Exchange, addressing a timing issue in a construction defect coverage claim.

The facts are very straightforward. The Oregon high court summarized them in one paragraph, which I won't try to improve upon: "On July 15, 2005, the Joneses filed an action against Bresee for breach of contract and negligence regarding the construction of their home. The Joneses alleged that, on April 2, 1999, they had contracted with Bresee, a contractor, for the construction of a custom home in Salem. They alleged that Bresee had failed to install flashing properly and that the exterior synthetic stucco, known as the Exterior Insulated Finish System (EIFS), leaked water into the interior and failed. They sought $52,580 in damages from Bresee, consisting of both the cost to repair the siding work and damages arising from the failure of the siding."

Bresee was insured under successive CGL policies issued by Farmers from the late 1980s to June 2003. Bresee sought coverage for the Joneses' action and Farmers denied coverage based on the "products-completed operations hazard" exclusion. The exclusion applies to "'bodily injury' or 'property damage' included within the 'products—completed operations hazard'" and is subject to an exception, based on the definition of "products—completed operations hazard," for "[w]ork that has not been completed," with several factual circumstances provided under which the policyholder's "work" is deemed completed.

For various reasons the trial court and Court of Appeals found in favor of Farmers. The Oregon Supreme Court reversed -- a decision dictated in great part by Oregon's application of the "four corners" rule for purposes of determining if an insurer is obligated to defend.

Looking at the Joneses' complaint the Supreme Court described some aspects of it as noteworthy: "The allegations do not state whether the claimed damages from the alleged breach of contract and negligence occurred before or after the completion of Bresee's work. From all that appears from a reading of the complaint, the described property damage occurred, or could have occurred, when Bresee's work was neither completed nor 'deemed complete' under the 'products completed operations hazard,' as defined in the policy."

Farmers saw the complaint differently, arguing that the court "should conclude that the property damage alleged in the Joneses' complaint occurred after Bresee completed its work, in part because that complaint was filed in 2005 and used verbs in their past tense (e.g., 'flashing was not properly installed,' 'the exterior synthetic stucco system failed') to describe the alleged deficient performance."

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Insurer Must Fold Tense: - *Continued*

The Supreme Court – unwilling to rule out every possible reading of the complaint -- sided with the Joneses: "The allegations describe events and damage that occurred in the past, but which could have occurred at any time after contract execution. The allegations describing past deficient performance and damage do not necessarily say anything about the date Bresee completed its work. The Joneses' allegations also do not permit this court to conclude that the alleged damage arose from Bresee's work that 'may [have] need[ed] service, maintenance, correction, repair or replacement but which is otherwise complete' within the meaning of the 'products—completed operations hazard' definition. The allegations say nothing about whether Bresee's work was 'otherwise complete,' or whether Bresee's work might need service, maintenance, etc., to be regarded as completed."

Many involved in construction defect coverage would probably look at the nature of these facts (a leaking EIFS system), combined with the timing of the filing of the complaint and its pleading in the past tense, and be confident that the property damage alleged took place after the home was completed, and, hence, within the terms of the "products-completed operations hazard" exclusion. But the Supreme Court of Oregon is not immersed in construction defect coverage issues the way that coverage professionals are. To the Supreme Court, this case was about adherence to its duty to defend standard. Looking at it as a duty to defend case, without intimate knowledge of construction defect coverage and claim practicalities, it is not difficult to see how the court's decision was dictated by its inability to rule out every possible reading of the complaint.

Given how crucial timing issues can be in construction defect coverage cases, the court's unwillingness to be persuaded, by the meaning of past tense pleading, makes Bresee Homes a potentially significant decision.

Bresee Homes, Inc. v. Farmers Insurance Exchange, No. CC 06C12550 (Or. Dec. 31, 2012) is available on the Supreme Court of Oregon website.

Seventh Circuit Flushes Coverage For Plumbing Mishap: "Voluntary Payments" Provision Applies -- Even If Insurer Would Not Have Participated In The Settlement Anyway

From the opening line of the Seventh Circuit's decision in West Bend Mut. Ins. Co. v. Arbor Homes, LLC it is not going well for Arbor Homes. And it only goes downhill from there. The decision opens with this: "A plumber hired by homebuilder Arbor Homes, LLC, ('Arbor') made one of the biggest mistakes a plumber can make: he forgot to connect the home's drainage system to the city's sewer."

To its credit, and the court makes this point repeatedly, Arbors stepped up and did what was needed to right this terrible mishap. On April 2, 2007, the day after learning of the situation, Arbors hired a firm to assess the damage, test the home and develop a plan to remove the sewage and decontaminate the home. Arbor hired a number of contractors to fulfill the recommendations. The required clean-up was comprehensive, and when all was said and done, Arbor paid more than $65,000 for cleaning, repairs and follow-up testing for the home.

But despite all of this, the homeowners, who had purchased a brand new home, were unwilling to accept a new home that had been filled with sewage and then cleaned. The homeowners sent a letter to Arbor demanding that Arbor buy the home from them and build them a new home. Still intent on making it right, "Arbor signed a settlement agreement with the [homeowners] that provided the homebuyers with a complete remedy. Among other things, Arbor agreed to buy the tainted home from the [homeowners], build another new home for them (using a different plumbing contractor), pay for all of the closing costs and moving expenses related to the new home, and compensate the [homeowners] for any increase in their mortgage rate on the purchase of the second home." This settlement agreement was signed on June 6, 2007.

Seventh Circuit Flushes Coverage For Plumbing Mishap: - *Continued*

Following the settlement, Arbor sued the plumbing contractor, Willmez. On October 12, 2007, Arbor sent a copy of the complaint to West Bend, Willmez's commercial general liability insurer, and sought coverage as an additional insured under the policy. West Bend denied coverage and filed an action seeking a declaratory judgment that it had no liability for the settlement. While West Bend asserted various grounds for disclaiming coverage, the court's analysis was limited to the question whether Arbor, by reaching the settlement without West Bend's involvement, breached the policy's voluntary payments provision.

An important point in the case is that West Bend initially maintained that Arbor was not an additional insured under the policies, but later acknowledged that this position was factually incorrect and that Arbor should have been treated as an additional insured.

Following a discussion of the purpose of a voluntary payments provision – give the insurer "the opportunity to protect itself and its insured by investigating any incident that may lead to a claim under the policy, and by participating in any resulting litiga tion or settlement discussions" -- the court held that it had been breached: "There is no evidence that West Bend 'consented' to any settlement as required by the voluntary payments provision. Although Arbor behaved admirably in expeditiously resolving the matter for the homeowners, it failed to protect its own interests when it relied on Willmez to notify West Bend about the incident, and failed to obtain West Bend's consent for any settlement. Having no opportunity to participate in the investigation or settlement, West Bend is entitled to enforcement of the plain language of the contract: Arbor's settlements with Willmez and with the [homeowners] without the consent of West Bend is at Arbor's own expense."

The court's conclusion, that no coverage was owed to Arbor, because it had breached the voluntary payments provision, is not surprising. What makes the decision of interest is the court's rejection of Arbor's arguments. "Arbor contends that West Bend may not rely on the voluntary payments provision to bar coverage because West Bend refused to recognize Arbor as an 'additional insured' from October 2007 through August 2010. Arbor argues that notice to West Bend would have been futile because West Bend refused to treat it as an insured. Moreover, Arbor maintains, West Bend suffered no prejudice by Arbor's late notice because West Bend would not have participated in settlement negotiations even if it had received the requisite notice sooner."

But the court rejected the argument -- concluding that the existence of other coverage defenses did not preclude West Bend from relying on the clearly breached voluntary payments provision to disclaim coverage.

This is not a far out argument for an insured to make to its insurer: "Look, what difference does it make that you didn't know about the settlement. You would not have gotten involved anyway, since you would have said that no coverage was owed for other reasons." But the court rejected the argument -- concluding that the existence of other coverage defenses did not preclude West Bend from relying on its voluntary payments provision. In other words, it was enough that there was a breach of the voluntary payments provision, period. This prevented a need to delve into the complexity – and it would likely have been that -- of how other coverage defenses may have affected the insurer's actions, if it had been offered the opportunity to participate in the settlement before it had been reached.

West Bend Mut. Ins. Co. v. Arbor Homes, LLC, No. 12-2274 (7th Cir. Jan. 8, 2013) is available on the Seventh Circuit website.

From Small Things: Fifth Circuit Duty To Defend: Complaint Allegation Of Violation Of Statute Does Not Mean That Every Available Remedy Is Pleaded

At 16, she quit high school, to make her fortune in the Promised Land.
She got a job behind the counter at an all-night hamburger stand.
She wrote faithfully home to Mama, "Now mama, don't you worry none.
From small things, Mama, big things one day come."

Bruce Springsteen, The Essential Bruce Springsteen, 2003

Usually when a court issues a coverage decision that is only one paragraph in length it is a safe bet that it does not have much reach beyond the involved parties. The Fifth Circuit's opinion in CSA Nutraceuticals v. Chubb Custom Insurance Company is of the one-paragraph variety. But unlike most cases in this category, from this small thing, big things could someday come.

The Appeals Court in CSA addressed coverage for California claims brought against CSA Nutraceuticals by consumers who alleged that they were induced to purchase ineffective weight loss products by false and fraudulent misrepresentations. The court held that the insurer had no duty to defend because the underlying action did not potentially seek recovery for "bodily injury."

The court concluded that "[t]he complaints do not include a single factual allegation suggesting that any consumer has ever been physically harmed by the weight loss products. As the district court observed: 'Failing to achieve weight reduction means the body basically did not change. It does not mean that the body was injured.'"

Claims seeking coverage for California consumer protection suits are not uncommon. I found this conclusion to be noteworthy on the basis that some insurers may be reluctant to disclaim coverage for a defense in a case such as this. The underlying action involves a weight loss product – something that is clearly related to, intimately so, the body. Could an underlying claim that is so closely associated with the body cause insurers to pause and consider whether this could somehow qualify as a "bodily injury." It does not. And while the insurer likely feels confident of that conclusion, could the question, when asked not in a vacuum, but against the backdrop of a very broad duty to defend standard – and that's the important part here -- cause a cautious insurer to decide otherwise? CSA made clear that claims involving false and fraudulent misrepresentations about a product that affects the body is not tantamount to injury to the body.

Second, and more significantly, as this is an issue that arises more frequently, the CSA court also held that, while relief based on bodily injury was available under the statutes at issue, that was irrelevant for purposes of triggering a defense -- which is based on the factual allegations in the complaint.

The court was quick to point out that, in the matter at hand, the underlying plaintiffs alleged that they were financially harmed by purchasing an ineffective product.

This is a noteworthy conclusion as this issue is not an uncommon one. When a complaint alleges a violation of a statute, and the plaintiff states certain relief being sought, is the plaintiff also seeking – even if just for purposes of triggering a duty to defend -- every other type of relief that can be had under the statute? It is easy to see an insured making this argument, especially when the issue is being addressed in the context of a broad duty to defend standard. CSA answered that, when a plaintiff is seeking damages under a statute, it remains the specific allegations in the complaint that controls the duty to defend determination -- and all other available relief under the statute is not deemed to also being sought.

CSA Nutraceuticals v. Chubb Custom Insurance Company, No. 12-10317 (5th Cir. Jan. 2, 2013) is available on the Fifth Circuit website.

Declarations:

The *Coverage Opinions* Interview With Robert Hartwig, Ph.D.

Robert Hartwig, Ph.D.

Coverage Opinions goes one on one with Bob Hartwig, President of the Insurance Information Institute. Bob has been with the I.I.I. since 1998, served as its Chief Economist, and since 2007 its President. Bob is best known as the voice of the Property & Casualty insurance industry. When you say Michael to refer to a basketball player, no last name is needed. It's like that when you are discussing the insurance industry and simply say Bob.

When insurance is in the news, his is the voice that you can expect to hear – whether in the major print media or on broadcast or cable television – speaking for the insurance industry. That one person can serve as a spokesperson for an industry as large and diverse as insurance P&C is remarkable. Bob talks about the function of the I.I.I., challenges to being a spokesperson for the insurance industry and his reaction to being named last year as one of 25 "living legends" in insurance.

Bob, thank you very much for taking the time to speak with Coverage Opinions. The I.I.I. describes itself as "Improving public understanding of insurance – what it does and how it works." Can you describe the function of the I.I.I. and its relationship to the industry?

The I.I.I. is 53 years old in 2013 and over that time its relationship and to the world at large has morphed with the times. Many people today think about the Institute as the "Wikipedia" of insurance. Whatever you need, we've got it—and quick. But I think that would still be selling ourselves short. Our staff has unparalleled expertise. Many I.I.I. staff have been with the organization 20-plus years. Functionally, we merge our experience and vast information resources with cutting technology to produce a highly effective, efficient and credible organization that is respected the world over.

You've presented the property/casualty insurance industry's side of the story on Capitol Hill and to just about every major newspaper, magazine and broadcast network. Not long ago I was getting dressed, brushing my teeth in front of CNBC, and there you were. How much of your time is spent speaking with the media?

On any given day I personally do three to five interviews. Of course when major insurance events, such as Hurricane Sandy strike, I will speak to dozens of media within the span of a single day. As a whole, the organizations conducts some 3,000 interviews per year and responds to thousands of data requests from media. Of course, these days the media often simply access information from our site and use it as they see fit.

I imagine that there are challenges to being a spokesperson for the insurance industry. The subject matter is complex and the industry can be perceived in a negative light.

Speaking on behalf of a half-trillion dollar, highly competitive industry can frequently pose challenges. Insurance is a complex issue, one that many people care not to think about until they have to. The industry also operates at the intersection of the political and legal world. That's a tough space to play. At the same time, there are so many things that this industry does that make me excited to get out of bed each morning and proud to think about each night when I go home.

The public sees your work as an insurance industry spokesperson. What are your other major functions at the I.I.I.?

It's true, we're the public face of the industry. Many people see us through our media appearances. But the Institute is an in-depth information resource.

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Declarations: - *Continued*

We also respond to thousands of requests for data, information and analysis every year from insurers, regulators, legislators, academics, investors and others. Virtually every branch of federal, state and local government seeks our input and expertise. Just today I worked on requests from the White House Council of Economic Advisors and New York City Mayor Bloomberg's office. It's always something different, and that's part of what makes the job so interesting.

You are an economist by training, but I know from our dealings that you have a soft spot for claims. Where do claims fit into your role at the I.I.I.?

Claims are often the unsung hero of a positive experience with an insurer. While there are plenty of snappy ads on TV these days, at the end of the day a customer will judge their insurer based on their claims experience. I admit that I love to spew claims statistics. It gives me immense pride to say that insurers will pay some 1.4 million victims of Hurricane Sandy some $25 billion in their time of greatest need. As an economist I think about how those claim dollars paid to rebuild not just individual homes and businesses, but entire communities.

Last year National Underwriter named you one of 25 "living legends" of insurance. What was your reaction to hearing that?

I was humbled. There were 24 other names on the list and feel fortunate and gratified to be among them. Beyond that, I thought it was cool. Oh, and I posted the link to my Facebook page!

Economics has a reputation for being boring. Insurance has a reputation for being boring. You are an economist in the insurance industry. Tell me about some things you do outside the office that are not consistent with the image of an economist for the insurance industry.

If you think economics is boring, you had a bad professor in college. And I happen to think insurance is fascinating, but I will concede it's an acquired taste. But outside of an insurance economist's persona there exists a real human. I love to run and because I travel extensively for work I take my running shoes with me all around the world. I have run through the Vatican, under the Eiffel Tower and around the Emperor's Palace in Tokyo—and that's just the tip of the iceberg. I try to run about 20 miles per week. It helps me keep my energy level up. I always run with my camera. The world is an amazing place and I'm forever grateful that my job has afforded me the opportunity to travel through much it!

Late-r Notice:
A Look At Decisions To Come

Georgia Supreme Court To Address "Separation of Insureds" Clause For Employer Negligence

The separation of insureds clause is going primetime. While this policy provision is no stranger to coverage litigation, it usually finds itself at the center of disputes over whether an exclusion that applies to "any" insured precludes coverage for an "innocent co-insured."

But the separation of insureds clause is now turning up in another context. The Supreme Court of Indiana will soon decide in Holiday Hospitality Franchising, Inc. v. Amco Ins. Co. whether negligent hiring and supervision of an employee constitutes an "occurrence" by the employer in a case involving sexual molestation by a hotel employee of a minor guest. This question generally turns on whether the employer's conduct was an accident. However, the Indiana high court may address the issue differently -- based on a separa tion of insureds provision, can the employer's conduct be an "occurrence," even if the employee's is not.

Now the Georgia Supreme Court has an analogous scenario before it, thanks to a certified question presented to it by the Fourth Circuit. In IFCO Systems North America v. American Home Assurance Company, the Georgia Supreme Court will address whether claims against IFCO, for theft of goods by its employees from a customer warehouse, constitute an occurrence under a commercial general liability policy. In other words, can an employee's intentional conduct be treated as an accident in a subsequent action against the employer alleging negligent hiring, training, supervision and retention. The Fourth Circuit observed that a separation of insured's provision "may require us to approach the question of coverage solely from IFCO's perspective. Given this approach, we may conclude the thefts were 'accidents' because IFCO neither intended nor reasonably could have foreseen that its employees would engage in intentionally tortious conduct."

IFCO Systems North America v. American Home Assurance Company, No. 11-2328 (4th Cir. Jan. 3, 2013) is available on the Fourth Circuit website.